

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DAVID MIER,

Defendant-Appellant.

UNPUBLISHED

June 16, 2009

No. 283453

Saginaw Circuit Court

LC No. 06-027393-FC

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of unarmed robbery, MCL 750.530(1), as a lesser offense of armed robbery, MCL 750.529, and bank robbery, MCL 750.531. The jury found defendant not guilty of the additional charge of possession of a firearm during the commission of a felony. MCL 750.227b(1). The trial court sentenced defendant to concurrent prison terms of 57 to 180 months for each conviction. Because there were no errors warranting relief, we affirm.

I. Corpus Delicti Rule

Defendant first argues that the trial court erred when it permitted the admission of a portion of his statement to the police. Specifically, defendant contends that his statement to the police that he possessed a gun was barred under the corpus delicti rule.

This Court reviews a trial court's decision concerning the corpus delicti rule for an abuse of discretion. *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006). "The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). Accordingly, "the rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury (for example, death in the case of homicide) and (2) some criminal agency as the source of the injury." *Id.* at 269-270. Only a preponderance of the direct or circumstantial evidence is required to satisfy the rule. See *King*, 271 Mich App at 239. Once there is proof of the underlying crime, a defendant's confession can be used to establish his or her degree of culpability. *Id.* at 241-242.

Unarmed robbery is a necessarily included lesser offense of armed robbery. *People v Reese*, 242 Mich App 626, 630; 619 NW2d 708 (2000). Therefore, the use of a weapon goes to the degree of the crime, not the corpus delicti. Bank robbery does not require proof that a weapon was used at all. See MCL 750.531. Thus, the use of a weapon is not part of the corpus delicti of bank robbery.

In this case, the bank teller's testimony and the bank surveillance tape showed, independently of defendant's confession, that someone committed a bank robbery. That evidence was sufficient to establish the corpus delicti of armed robbery, unarmed robbery, and bank robbery. Thus, there was no error in admitting defendant's confession to aid in establishing the identity of the perpetrator and his degree of culpability. *King*, 271 Mich App at 241-242.

II. Effective Assistance of Counsel

Next, defendant argues that defense counsel was ineffective for eliciting information about defendant's visit to the courthouse after the robbery, which defendant contends resulted in inaccurate and prejudicial evidence being presented to the jury. To establish ineffective assistance of counsel, "defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question, i.e., that there is a reasonable probability that, but for counsel's error, the outcome would have been different. *Id.* at 312-314.

Contrary to what defendant argues, the prosecutor elicited the challenged information, not defense counsel. Defendant does not challenge defense counsel's failure to object. In any event, the decision whether to object was a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant has not overcome the presumption that defense counsel's decision not to object was to avoid drawing further attention to defendant's prior misconduct. Accordingly, defendant has not established that defense counsel was ineffective.

III. Prosecutorial Misconduct

Defendant next argues that the prosecutor committed misconduct by asking a witness whether he believed defendant's explanation concerning the source of his money. This Court reviews claims of prosecutorial misconduct in context and on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

It is improper for the prosecutor to ask one witness to comment on the credibility of another witness. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). However, the prosecutor's conduct must be considered in light of any evidence or theories presented by the defense. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Conduct that might be considered improper standing alone does not rise to error requiring reversal when it is responsive to defense evidence or theories. *Id.* at 593.

In this case, defense counsel challenged the witness's credibility on cross-examination, asking him whether he believed various portions of defendant's story. On redirect examination, the prosecutor did not ask the witness to comment on defendant's credibility. Rather, the prosecutor sought to clarify the witness's perception of the facts in light of defense counsel's questioning. Hence, the prosecutor's line of questioning was responsive to defense counsel's cross-examination. There was no misconduct.

IV. Scoring of the Sentencing Guidelines

Lastly, defendant argues that the trial court erred in scoring Prior Record Variable (PRV) 7 and Offense Variable (OV) 1 of the sentencing guidelines. Although defendant objected to the trial court's scoring of OV 1 at sentencing, he did not object to the scoring of PRV 7. Therefore, only defendant's challenge to the scoring of OV 1 is preserved. MCR 6.429(C). However, this Court may review unpreserved scoring issues affecting the appropriate guidelines range for plain error. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002).

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant argues that five points should not have been scored for OV 1 (weapon displayed or implied), MCL 777.31(1)(e), because the corpus delicti rule prevented the use of his confession to establish that he possessed a gun during the offense. As previously explained, because there was independent evidence of a robbery, defendant's confession was admissible to establish his degree of culpability. Thus, there is no merit to this argument.

Defendant also argues that 20 points were improperly scored for PRV 7. At trial, defendant was convicted of two felonies. Thus, for each offense being scored, he had only one other concurrent felony. He was not convicted of any other concurrent or subsequent felonies. Thus, under MCL 777.57(1)(b), only ten points should have been scored for PRV 7, and it was plain error to score this variable at 20 points. However, because reducing defendant's total PRV total from 42 to 32 does not affect his placement in PRV level D for a class C offense, see MCL 777.64, this error does not warrant resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

There were no errors warranting relief.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Michael J. Kelly